

RS-17-001-2286C



United States Environmental Protection Agency
Regional Administrator
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

SEP 07 2017

The Honorable Tammy Baldwin
United States Senate
Washington, D.C. 20510

Dear Senator Baldwin:

Thank you for your August 18, 2017, letter urging the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency to assume Clean Water Act (CWA) Section 404 permitting authority for the proposed Back Forty mine project from the State of Michigan, and to conduct full project reviews under the CWA and the National Environmental Policy Act (NEPA).

Under the CWA and EPA and Corps regulations, where a state has assumed the CWA Section 404 permitting program, authority to issue Section 404 permits for projects impacting waters within that state's jurisdiction remains with the state, unless EPA objects to the issuance of a permit regarding a particular project and the state fails to resolve the objection. In such a case, CWA Section 404 permitting authority for the project would transfer to the Corps by operation of law. The Corps' permitting process would constitute a federal action invoking other requirements such as review under NEPA.

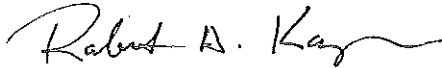
EPA previously objected to the issuance of a CWA Section 404 permit for the Back Forty mine project based on an application that the Michigan Department of Environmental Quality (MDEQ) had publicly noticed. The applicant, Aquila Resources, Inc., withdrew that application and submitted a revised application to MDEQ. It is our understanding that MDEQ has requested additional information from the applicant. When MDEQ has determined that it has a complete permit application, it will public notice the revised application and send it to EPA for review. If EPA objects again to the CWA Section 404 permit, and the State does not resolve the objection, permitting authority would transfer to the Corps.

For your information, enclosed is a copy of an August 21, 2017, letter from Gary Besaw, Chairman of the Menominee Indian Tribe of Wisconsin, raising a different rationale for the assertion of federal permitting jurisdiction over the Back Forty mine project. Chairman Besaw contends that wetlands which would be impacted by the Back Forty project are not assumable under Michigan's Section 404 program, and has requested that the Corps and EPA consult with the Menominee Indian Tribe of Wisconsin on this

matter. EPA is preparing its response to Chairman Besaw and will provide you with a copy when it is final.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may contact Denise Fortin, Region 5 Congressional Liaison, at (312) 886-3000.

Sincerely,

A handwritten signature in cursive script that reads "Robert A. Kaplan". The signature is fluid and includes a long, sweeping horizontal line at the end.

Robert A. Kaplan
Acting Regional Administrator

Enclosure



MENOMINEE INDIAN TRIBE OF WISCONSIN
CHAIRMAN'S OFFICE

P.O. Box 910
Keshena, WI 54135-0910

August 21, 2017

Robert A. Kaplan
Acting Regional Administrator
U.S. EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

Lt. Col. Dennis P. Sugrue
U.S. Army Corps of Engineers
Detroit District
477 Michigan Ave.
Detroit, MI 48226

Re: Consultation Regarding Aquila Resources, Inc. Back Forty Mine Project
Permitting Pursuant to Section 404 of the Clean Water Act

Dear Mr. Kaplan & Lt. Col. Sugrue:

The Menominee Indian Tribe of Wisconsin requests consultation with the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("USACE") in regard to 404 permitting related to the Back 40 mine project. The Back 40 mine project consists of an open pit (2,000 ft. wide, 2,500 ft. long and 750 ft. deep) gold-zinc sulfide mine located 150 feet from the banks of the Menominee River, near the creation site of the Menominee people. Construction and operation of the mine threatens to destroy significant historical and cultural resources of the Tribe, and presents significant harm to the Menominee River environment.

The United States of America owes a trust responsibility to the Menominee Indian Tribe of Wisconsin. The EPA and USACE as departments of the federal government are required to carry out that trust responsibility. Normally, EPA and USACE would carry out that responsibility as part of the federal permitting process pursuant to Section 404 of the Clean Water Act. As part of that permitting process, EPA and USACE would apply provisions of the National Historic Preservation Act and National Environmental Protection Act. Those provisions would allow for a full and fair investigation and review of the Menominee Indian Tribe's concerns regarding threats to its cultural properties and to the environment of the Menominee River. However, the mine site is located in Michigan and authority over certain 404 permitting has been delegated from the United States to the State of Michigan.

The State of Michigan has stated that it owes no trust duty to the Menominee Indian Tribe, and is not required to follow National Historic Preservation Act and National Environmental Protection Act standards protective of the Tribe's interests. As a result, the United States delegation of 404 permitting to Michigan acts as a diminishment of its trust responsibility to the Tribe.

The Tribe is conscious that the Clean Water Act prohibits the United States from delegating 404 permitting authority to the State of Michigan in regard to certain waters of the United States. As a result,

United States may not delegate the authority to issue a 404 permit regarding these wetlands to the State of Michigan.

Meaning of Interstate Commerce

The Menominee River adjacent to the wetlands at issue is an interstate body of water forming a boundary between the State of Michigan and the State of Wisconsin. In *Finneseth v. Carter* 712 F.2d 1041 (C.A.6 (Ky.), 1983), the Sixth Circuit Court of Appeals addressed the meaning of interstate commerce on a body of water lying in two different states. In *Finneseth*, the Court was asked to determine whether it had jurisdiction over a dispute resulting from a boat collision that occurred on Dale Hollow Lake which lies on the border of Kentucky and Tennessee. In order to determine whether there was federal jurisdiction over the dispute, the Court needed to find a number of things, including whether a wrongful injury occurred upon “navigable waters.” *Finneseth* at 1043. The Court found that Dale Hollow Lake would constitute navigable waters if:

“... it is used or capable or susceptible of being used as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water.” *Finneseth* at 1044.

Although this definition of navigability was used to determine federal jurisdiction under admiralty law, it mirrors the non-delegability provision of 33 U.S.C. § 1344(g)(1). The Court found that Dale Hollow Lake was “used as an interstate highway for commerce” stating:

“In this case Dale Hollow Lake clearly meets the requirement that the lake be an *interstate* highway for commerce because it straddles Kentucky and Tennessee. Because the interstate nexus is satisfied in this manner, it is not probative that maritime traffic on the lake is prevented from traveling downstream by the lockless dam.” *Finneseth* at 1044.

The term “commerce” includes a wide variety of activities. The Ninth Circuit Court of Appeals determined that use of an Alaskan river for commercial recreational boating is sufficient evidence of the Water’s capacity to carry waterborne commerce. *Alaska v. Ahtna, Inc.*, 891 F.2d 1404, 1405 (9th Cir. 1989). Further, the non-delegability provision of 33 U.S.C. § 1344(g)(1) does not require that a body of water be actually used in interstate commerce, only that it be “susceptible” to such use. The Supreme Court of the United States has stated:

“Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.” *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940).

Menominee River Present Use and Susceptibility for Use to Transport Interstate Commerce

The Menominee River straddles Michigan and Wisconsin in the same way that Dale Hollow Lake straddles Kentucky and Tennessee. As found by the Sixth Circuit Court of Appeals in *Finneseth* this geographical location alone satisfies the requirement that any commerce present be interstate.

Michigan in a MOA is not dispositive of the issue. If the waters are non-delegable as a matter of law pursuant to 33 U.S.C. § 1344(g)(1), then any purported delegation of permitting authority over those waters is void and unenforceable.

Federal regulations state that precise definitions of “navigable waters of the United States” or “navigability” are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. (33 C.F.R. § 329.3). Further, USACE listings of Navigable Waters of the United States may be updated “as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.” (33 C.F.R. § 329.16).

The issue of defining what waters are assumable pursuant to Section 404(g)(1) has caused significant confusion since its inception. Many states and tribes have considered pursuing assumption, but determined not to proceed due to the uncertainty regarding what waters may be assumed.

The Assumable Waters Subcommittee was convened under the National Advisory Council for Environmental Policy and Technology (NACEPT) to consider the issue of which waters are legally assumable by a state or tribe under the Clean Water Act. The Assumable Waters Subcommittee presented their recommendations to the NACEPT members on May 10, 2017 and submitted it to Administrator Scott Pruitt on June 2, 2017.

The Subcommittee did not reach agreement on a single recommendation, and therefore a majority and a USACE alternative were put forth. Neither recommendation endorsed adoption of the Section 10 Waters list as determinative of whether a water is assumable. Both the majority and USACE recommend using the Section 10 Waters list as a starting point and modifying it as warranted. These recommendations by the Subcommittee and USACE are contrary to the 1984 Michigan approach which relies solely on the list of Section 10 Waters when determining assumability.

The issue of whether the MOA is dispositive was also touched on in *Huron Mountain Club v. United States Army Corps of Engineers, et al.*, No. 12-cv-197, 2012 U.S. Dist. LEXIS 102961, 2012 WL 3060146 (W.D. Mich. July 25, 2012). In that case Huron Mountain Club sought an injunction against Kennecott Eagle Minerals (“Kennecott”) construction of the Eagle Mine in the Upper Peninsula of Michigan based on a number of issues including that Kennecott had failed to obtain a § 404 permit from the USACE. In its brief in support of its injunction Huron Mountain Club did not address the issue of § 404 delegation to Michigan. Kennecott, in its brief in opposition, mentioned delegation in passing in a footnote. The federal defendants (USACE, EPA, DOI, etc.) in their brief argued that Michigan had assumed jurisdiction in this matter stating:

“In a separate agreement executed in 1984, the Corps and the State agreed that Michigan shall assume Section 404 regulatory jurisdiction over all waters in the State except those listed on the exhibit to the 1984 agreement. Id. ¶ 9, Appx. 2. The Salmon Trout River was not on the list and thus only the State of Michigan has Section 404 permitting authority over that water body. Id. ¶ 11.”